Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-107

STATE OF CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL.,

Petitioners,

v.

PERVEL INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: July 20, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

STATE OF CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL.,

Petitioners,

v.

PERVEL INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner State of Connecticut Commission on Human Rights and Opportunities prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 23, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (hereinafter Court of Appeals), entered April 23, 1979, has not yet been officially reported. The opinion is printed in Appendix A at pp. 1a and 2a. The Court of Appeals affirmed the summary judgment granted by the United States District Court for the District of Connecticut (hereinafter District Court). The Memorandum of Decision of the District Court is reported at 468 Fed.Supp. 490, and is printed in Appendix C at pp. 5a-10a.

JURISDICTION

The judgment of the Court of Appeals of which review is sought here was entered April 23, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(2).

QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*, (hereinafter ERISA), preempts the State of Connecticut Commission on Human Rights and Opportunities so as to prohibit the assertion of jurisdiction under Connecticut General Statutes, § 31-126(a) and § 31-126(g), which provide protection against discrimination based on pregnancy disability?

2. Whether the State of Connecticut Commission on Human Rights and Opportunities was prohibited from asserting jurisdiction under Connecticut General Statutes, § 31-126(a) and § 31-126(g), for a period of time between the effective date of ERISA, 29 U.S.C. 1001, *et seq.*, and the

effective date of the Pregnancy Disability Act, Pub.L. No. 95-555, 92 Stat., 2076 (codified in Title VII of the Civil Rights Act of 1964 at 42 U.S.C. § 2000e(k)).

STATUTES

Pertinent statutes are printed in Appendix D, at pp. 11a-15b.

STATEMENT OF THE CASE

This case arose upon an action filed in the District Court for the District of Connecticut by respondent, Pervel Industries, Inc. Said action sought to enjoin the petitioner, State of Connecticut Commission on Human Rights and Opportunities, from proceeding on two complaints of discrimination claiming denial of pregnancy disability benefits under Connecticut General Statutes § 31-126(a) and § 31-126(g).

Two of Pervel's employees became pregnant during their employ. They sought and were denied benefits under the negotiated sickness and disability plan. Upon denial of these benefits, the employees filed complaints with the State of Connecticut Commission on Human Rights and Opportunities. Subsequently, the Commission notified Pervel that denial of the benefits in question constituted discrimination under Connecticut law and ordered a hearing. Pervel then filed in the District Court seeking declaratory and injunctive relief against the administrative proceedings, invoking jurisdiction under 28 U.S.C. 1337, 28 U.S.C. 2201, 29 U.S.C. 1000, *et seq.*, (ERISA), 29 U.S.C. 141 *et seq.*

On stipulated facts, the District Court, Honorable Jon O. Newman, United States District Judge, entered Summary Judgment for Pervel finding that ERISA preempts

Connecticut's Fair Employment Practices Law insofar as the provisions of that law apply to employee benefit plans subject to ERISA, and enjoined the Commission on Human Rights and Opportunities from further proceedings against Pervel.

The District Court, citing *Gilbert v. General Electric Corp.*, 429 U.S. 125 (1976), found that as exclusion of pregnancy disability benefits did not violate federal law under Title VII, ERISA must preempt Connecticut's law on pregnancy disability, inasmuch as ERISA's preemption of Connecticut's law would not then "impair" any law of the United States under § 514(d) of ERISA (29 U.S.C. 1144).

The United States Court of Appeals for the Second Circuit affirmed the opinion of the District Court, holding that state statutes relating to employee benefit plans were preempted by ERISA prior to passage of the amendment to Title VII by the Pregnancy Disability Act.

REASONS FOR ALLOWANCE OF THE WRIT

The decision below is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Bucyrus Erie Company v. The Department of Industry, Labor and Human Relations of the State of Wisconsin, et al.*, Civil No. 78-2079 (E.D.Wis. filed May 24, 1979) (hereinafter *Bucyrus Erie;* see Appendix E at pp. 16a-34a):

> ...we believe that there is evidence outside section 514 of ERISA revealing a congressional intent to preserve the application of state fair employment laws in general, and pregnancy disability laws in particular. We find however, that this intention to

> except fair employment laws from preemption need not be implied. Instead, we rely on this evidence of intent to conclude that the preemption of state fair employment laws would operate to 'alter, amend, invalidate, impair or supersede' another federal 'law, rule or regulation' in contravention of an express exception in section 514 of ERISA 29 U.S.C. 1144(d).

In reaching this conclusion, the Court in *Bucyrus Erie* relied on another decision by the United States Court of Appeals for the Second Circuit, *AT&T v. Merry*, 592 F.2d 118 (2d Cir. 1979) (hereinafter *Merry*).

In *Merry*, the Court of Appeals found that in some cases it is appropriate to imply congressional exceptions to ERISA preemption where there is evidence of federal policy manifested in other statutes. The Court of Appeals found that ERISA did not preempt a state court judgment ordering the garnishment of an employee's pension income to satisfy a support obligation even in the face of a specific prohibition in ERISA against the involuntary assignment or alienation of pension benefits.

The Second Circuit Court of Appeals declined to apply the same reasoning to the present case, despite the fact that the facts in *Pervel* do not revolve around the main thrust of ERISA; that is, pension benefits, and despite the fact that ERISA contains no specific prohibition against enforcing fair employment laws.

In *United Steelworkers of America v. Weber*, 47 U.S.L.W. 4851 (U.S. June 27, 1979), this Court recently endorsed the rationale of *Merry* in the context of Title VII, a federal law at issue here:

> It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

The Court in *Bucyrus Erie* properly considered the history of ERISA and of Title VII in reaching its conclusion that ERISA preemption of fair employment laws is within neither the spirit nor intent of the law. More importantly, preemption is not within the letter of the law, since state laws regarding fair employment practices are preserved under Title VII and Title XI of the Civil Rights Act of 1964 under § 708, 42 U.S.C. § 2000e-7, and § 1004, 42 U.S.C. § 2000h-4, respectively. ERISA does not interfere with this preservation of state law, since ERISA § 514 (d), 29 U.S.C. 1144, states in pertinent part:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law.

The enforcement scheme of Title VII is founded on a cornerstone of deferral to state agency proceedings. 42 U.S.C. 2000e-5. (See Appendix D, pp. 13a-15a). The results below present critical questions to the integrity of the scheme and to Title VII in contravention of this Court's position in *Weber, supra*.

The decision below is in conflict with the decision of the Seventh Circuit Court of Appeals, presents an important question of federal law which has not been, but should be, settled by this Court, and is in conflict with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 23, 1979.

Respectfully submitted,

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APPENDICES

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued March 12, 1979 Decided April 23, 1979.)

Docket No. 78-7604

PERVEL INDUSTRIES, INC.
Plaintiff-Appellee

against

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL.
Defendant-Appellants

Before:

KAUFMAN, MULLIGAN, AND GURFEIN
Circuit Judges

Appeal from an order of the United States District Court for the District of Connecticut, Hon. Jon O. Newman, *Judge*, granting plaintiff's motion for summary judgment.

Affirmed.

THOMAS M. CLOHERTY (Murtha, Cullina, Richter and Pinney, Hartford, Connecticut) for *Plaintiff-Appellee*.

CHRISTINA G. DUNNELL, Assistant Attorney General, Hartford, Connecticut for *Defendant-Appellee*.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

This case arose before the amendment of Title VII in October 1978 by the Pregnancy Disability Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e (k). At that time state statutes, except those specifically excluded, were preempted by ERISA "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Connecticut Statute is subject to preemption for the reasons stated in Judge Newman's opinion, —— F. Supp. ——.

We therefore affirm on that opinion, which generally sets forth our own views.

IRVING R. KAUFMAN
Chief Judge

WILLIAM H. MULLIGAN
MURRAY I. GURFEIN
Circuit Judges

APPENDIX B

Judgment Entered October 17, 1979, by the
United States District Court for the
District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-78-459

PERVEL INDUSTRIES, INC.

v.

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL.

SUMMARY JUDGMENT

The above-identified action came on for consideration by the Court by the Honorable Jon O. Newman, United States District Judge, of the Plaintiff's Motion for Summary Judgment; and,

After a hearing on the Plaintiff's Motion and consideration of all material submitted in connection therewith, the Court filed its Memorandum of Decision granting the Plaintiff's Motion for Summary Judgment;

It is therefore accordingly ORDERED and ADJUDGED that Summary Judgment enter and hereby does enter for the Plaintiff, Pervel Industries, Inc; and,

It is further ORDERED and ADJUDGED that the Employee Retirement Income Security Act of 1974 preempts Connecticut General Statute § 31-126 insofar as the provisions of the State statute apply to employee benefit plans subject to ERISA; and,

It is further ORDERED and ADJUDGED that the Defendants be and hereby are enjoined from further proceedings against the Plantiff, Pervel Industries. Inc., with respect to the complaint of Henriette Deojay, dated June 2, 1977, and with respect to the complaint of Linda Gelinas, dated June 7, 1977.

Dated at Hartford, Connecticut, this 17th day of October 1978.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: WILLIAM TEMPLETON
Chief Deputy

APPROVED AND SO ORDERED.

By: JON O. NEWMAN
U. S. District Judge

APPENDIX C

Memorandum of Decision, United States District Court for the District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-78-459

PERVEL INDUSTRIES, INC.

vs.

STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL.

MEMORANDUM OF DECISION

This case presents the question of whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts provisions of a state's anti-discrimination law insofar as that law affects employee welfare benefits.

Plaintiff and the union that represents its production and maintenance employees have collectively bargained for the establishment of an employee welfare benefit plan, which is regulated pursuant to ERISA. Among the benefits provided by the plan are disability benefits. Two employees, defendants in this action, applied for disability benefits for leaves of absence granted because of pregnancy. When benefits were refused, the employees filed complaints before the

Connecticut Commission of Human Rights and Opportunities (CCHRO). A staff representative of the CCHRO notified plaintiff that the plan's failure to treat pregnancy as a nonoccupational disability constituted sex discrimination. Conn. Gen. Stat. § 31-126(g) prohibits an employer from denying an employee, "who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained" by the employer. On the basis of this view, a hearing has been ordered by the CCHRO, now scheduled for October 17, 1978. Plaintiff has brought this suit against the CCHRO, its director, the Connecticut Attorney General, and the two employees, seeking declaratory and injunctive relief to halt the administrative proceedings. Plaintiff has moved for summary judgment, and there are no material facts in dispute.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of subchapter I, concerning protection of employee benefit rights, "shall supersede any and all State laws insofar as the may now or hereafter relate to any employee benefit plan . . ." The broad sweep of this language and the deliberate Congressional intention to accomplish board preemption has recently been reviewed by this Court. *National Carriers' Conference Committee v. Heffernan*, —— F. Supp. —— (D. Conn. 1978). It was there pointed out that Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting, with certain specific exceptions, "all" state laws insofar as they "relate" to plans covered by ERISA. Plainly Connecticut's anti-discrimination law, legislating specifically on the subject of disability benefits, is a law that relates to an employee benefit plan. This Court therefore disagrees with the conclusion reached in

Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations, 17 FEP Cases 1230 (E.D. Wis. July 10, 1978), that preemption of state anti-discrimination laws has not occurred because ERISA did not expressly provide that state fair employment laws are superseded. While preemption by implication is not favored, see *Florida Line & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), there is no requirement that Congress indentify the several categories of state laws it wishes to preempt. Having elected to preempt all laws relating to covered plans, and to specify the categories of state laws that are not preempted, 29 U.S.C. §§ 1144(b)(2)(A), (b)(4), Congress is entitled to have its clearly expressed intentions carried out.

Nor is there merit in defendants' contention that ERISA preempts only those state laws that deal with the specific subjects covered by subchapter I of ERISA. This claim is refuted by the provisions of § 514(b)(4), explicitly excepting from preemption "any generally applicable criminal law of a State." If Congress had thought that only state laws specifically dealing with the subjects covered by subchapter I of ERISA were to be prempted by § 514(a), it would not have had to preserve generally applicable criminal laws, since they would not have been preempted in the first place. The exception to preemption for generally applicable criminal laws becomes necessary only when it is understood that, without such an exception, § 514(a) preempts all state laws that relate to covered plans, whether the relation arises because a state law is specifically designed to affect such plans or because, as in this case, a state law of general application includes covered plans within its sweep.

Defendants also contend that § 514 does not accomplish preemption of Connecticut's anti-discrimination law because of the interaction of § 514(d) and provisions of Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Section 514(d), 29 U.S.C. § 1144(d), provides: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . ." Section 708 of Title VII, 42 U.S.C. § 2000e-7 provides: "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . ." The argument is that ERISA does not supersede any federal law, Title VII preserves state anti-discrimination laws from preemption by Title VII, and "therefore" ERISA does not preempt state anti-discrimination laws. The argument has found favor with one district court, *Bucyrus-Erie Co., supra*, and with two state courts, *Goodyear Tire & Rubber Co. v. Department of Industry, Labor, and Human Relations*, 16 EPD ¶ 8163 (Circ. Ct. Dane County, Wis. Feb. 7, 1978), and *Lukus v. Westinghouse Electric Corp.* (unreported) (Ct. Common Pleas, Allegheny Cty., Pa. Apr. 20, 1978),[1] and been implicitly rejected by another state court, *Gast v. Oregon* (unreported) (Circ. Ct. Multnomah Cty., Ore. Nov. 16, 1977).

This Court does not accept the reasoning of this double savings clause contention. Section 514(d) of ERISA preserves *federal* law. Connecticut's anti-discrimination law does not become a federal law simply because Title VII preserves its validity as against a claim of preemption by Title VII. Nor is the textual argument significantly enhanced

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[1]This line of reasoning also finds some support in *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977). The First Circuit declined to find that ERISA preempted a provision of New Hampshire's insurance law, pointing out that such a conclusion would be inconsistent with the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which in turn ERISA "reaffirms" in § 514(d). 562 F.2d at 76 n.33. The central reasoning of *Wadsworth*, however, is that § 514(b)(2)(A) of ERISA explicitly saves state insurance laws from preemption.

by focusing on § 514(b)'s requirement that ERISA should not be construed to "impair" any law of the United States. Preemption of Conn. Gen. Stat. § 31-126(g) by ERISA does not impair any federal law. Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII. Whatever is prohibited by Title VII remains prohibited under ERISA, but exclusion of disability benefits for pregnancy does not violate Title VII, *Gilbert v. General Electric Corp.*, 429 U.S. 125 (1976).

Defendants stress the concern expressed in Congress during enactment of ERISA that plan benefits be made available on a non-discriminatory basis. In both the Senate and the House, anti-discrimination amendments were withheld upon the specific assurances of floors leaders of the legislation that plans covered by ERISA would be covered by § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). 120 Cong. Rec.4726 (1974), 119 Cong. Rec. 30409-10 (1973). But nowhere in the floor debates is any concern expressed, nor any assurance given, that *state* anti-discrimination laws will apply to palns covered by ERISA. In fact the colloquy in both chambers points in exactly the opposite direction.[2]

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[2]Similar evidence of Congressional intent may be gleaned from the Senate debate concerning the Age Discrimination in Employment Act Amendments of 1978 (ADEA), Pub. L. 95-256, 92 Stat. 189 *et seq.* (amending 29 U.S.C. § 623 *et seq.* (1970). Senator Javits noted, and Senator Williams agreed, that the new federal law, like existing state age discrimination laws, would not interfere with ERISA. Specifically, ERISA was understood to preempt state age discrimination laws relating to employee benefit plans, and this preemption "shall be determined without regard to section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law." 124 Cong. Rec. S. 4451 (daily ed. Mar. 23, 1978). This explicit acknowledgment by Senate architects of ERISA that state age discrimination laws were not to be preserved either by ERISA itself not through a double savings clause construction of ERISA and ADEA strongly supports the argument that ERISA wholly preempts the state sex discrimination laws at issue here.

Both the floor managers of ERISA and those who sought assurance that non-discrimination amendments were not needed expressed concern that any such amendments might detract from the thrust toward centralized administration of non-discrimination in employment by the Equal Employment Opportunities Commission.

It is true that ERISA does not mandate uniformity of plan benefits, and therefore preemption of state anti-discrimination laws is not required to maintain any scheme for federally-required uniformity of benefits. But ERISA does contemplate that plans subject to the Act, once negotiated, will be uniformly administered, free of state law variations, except in the specific areas saved from preemption by § 514. Subjecting these plans to the varieties of state laws that relate to such plans can only add to the cost of administration and ultimately impose costs on the plan beneficiaries.

Plaintiff's motion for summary judgment is granted. Judgment may enter declaring that the Employee Retirement Income Security Act of 1974 preempts Conn. Gen. Stat. § 31-126 insofar as the provisions of the state statute apply to employee benefit plans subject to ERISA, and enjoining the defendants from further proceedings against the plaintiff with respect to the complaints of Henriette Deojay, dated June 2, 1977, and Linda Gelinas, dated June 7, 1977.

Dated at Hartford, Connecticut, this —— day of October, 1978.

JON O. NEWMAN
United States District Judge

APPENDIX D

Statutes

CONNECTICUT GENERAL STATUTES

Connecticut General Statute, § 31-126(a)

It shall be an unfair employment practice for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, age, sex, marital status, national origin, ancestry or physical disability, including, but not limited to, blindness of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment;

Connecticut General Statute, § 31-126(g)

It shall be an unfair employment practice for an employer, by himself or his agent, (i) to terminate a woman's employment because of her pregnancy or (ii) to refuse to grant to said employee a reasonable leave of absence for disability resulting from such pregnancy or (iii) to deny to said employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by said employer. Upon signifying her intent to return, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

United States Code

29 U.S.C. 1001. Congressional findings and declaration of policy [ERISA], in pertinent part:

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready acess to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. 1144 [Section 514(a) ERISA]:

Except as provided in subsection (b) of this section, the provisions of *this subchapter and subchapter III of this chapter* shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975 . . .

29 U.S.C. 1144 [Section 514(c) ERISA]:

For purposes of this section:

(1) The term 'state law' includes all laws, decisions, rules, regulations or other state action having the effect of law, of any state . . .

(2) The term 'state' includes a state, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by *this subchapter*.

29 U.S.C. 1144 [Section 514(d) ERISA]:

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law.

42 U.S.C. 2000h-4 [Section 1104, Title XI, Civil Rights Act of 1964]:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, not shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. 2000e-5(b) [Section 706, Title VII, Civil Rights Act of 1964], in pertinent part:

. . . In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings

and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section . . .

42 U.S.C. 2000e-5(c) [Section 706, Title VII, Civil Rights Act of 1964], in pertinent part:

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, . . .

42 U.S.C. 2000e-5(d) [Section 706, Title VII, Civil Rights Act of 1964], in pertinent part:

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with

42 U.S.C. 2000e-5(e) [Section 706, Title VII, Civil Rights Act of 1964]:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employ-

ment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. 2000e-7 [Section 708, Title VII, Civil Rights Act of 1964]:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. 2000e (k) [Pregnancy Disability Act].

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and

women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. As used in this subsection, neither "pregnancy" nor "related medical conditions", as they relate to eligibility for benefits under any health or temporary disability insurance or sick leave plan available in connection with employment, may be construed to include abortions, except where the life of the mother would be endangered if the fetus were carried to term: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

APPENDIX E

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

(Argued February 14, 1979 Decided May 24, 1979.)

Docket No. 78-2079

BUCYRUS ERIE COMPANY, a corporation,
Plaintiff-Appellant

– against —

THE DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS
OF THE STATE OF WISCONSIN, ET AL.
Defendants-Appellees

Before:

CUMMINGS, AND SPRECHER,
Circuit Judges

AND LEIGHTON,
District Judge

SPRECHER, *Circuit Judge*. The plaintiff, Bucyrus-Erie Co., appeals from the district court judgment denying its request to enjoin various officers of the state of Wisconsin from exercising jurisdiction under the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.37, over a complaint alleging that plaintiff's employee disability benefit plan is sex discriminatory. The primary issue presented by this appeal is whether the Employee Retirement Income Security Act [ERISA] 29 U.S.C. §§ 1001-381, preempts the application of state fair employment laws to employee benefit plans.

I

The facts of the case are not in dispute. Bucyrus-Erie Co. is a Delaware corporation with its corporate headquarters located in Wisconsin. In October 1975, Martha Wasilik, a secretary in the employ of Bucyrus-Erie, requested a leave of absence on the basis of pregnancy. Ms. Walilik was granted a leave of absence in accordance with company policy.

Under the terms of the company's employee medical benefits plan as then in effect, pregnant employees were only permitted leave from work on an unpaid basis. They were not entitled to utilize accumulated sick-leave benefits. Such benefits were available only for illness, excluding pregnancy. In the fall of 1975, Ms. Wasilik filed charges with the Equal Employment Opportunity Commission and the Wisconsin Department of Industry, Labor and Human Relations (DILHR) alleging that this provision of the company's disability policy was sex discriminatory.

Before the date of the state hearing, the company filed a motion to dismiss alleging that state regulation of the company's disability plan was preempted by federal law.

The motion to dismiss was denied but a motion to stay was granted on February 14, 1978.

After losing the motion to dismiss before the state commission, the company promptly commenced this action in the district court seeking to enjoin the Wisconsin state officers from proceeding with the charges in violation of federal law. The lower court dismissed the plaintiff's complaint, rejecting the argument that the state of Wisconsin was engaging in impermissible regulation of the plaintiff's disability plan. We affirm the lower court's dismissal of the complaint.

II

The principal issue presented by this appeal is whether the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-381 preempts the application of the Wisconsin Fair Employment Act, Wis. Stat. §§ 111-31-111.37, to employee welfare benefit plans which are regulated by ERISA.[1] Although the statute is not unambiguous, we conclude that Congress did not intend to preempt the enforcement of state fair employment laws, and we therefore affirm.

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[1]The plaintiff also argues that Wisconsin's application of the fair employment act to the plaintiff places an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. Art. I, § 8, cl. 3. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 142 (1970), it was established that

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

The state does have a strong local interest in prohibiting employment discrimination. *Colorado Anto-Discrimination Commission v. Continental Air Lines, Inc.* 372 U.S. 714 (1963). We adopt the district court's finding that the balance of interests weighs in favor of the state. *Cf. Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

Although ERISA's substantive provisions are designed to regulate retirement benefit plans[2] the Act includes other types of benefit plans within its coverage.[3] The parties are in agreement that the Bucyrus-Erie plan governing pregnancy leave is a plan subject to the applicable requirements of ERISA. The fact that the Bucyrus-Erie benefit plan is the subject of federal regulation does not of course inevitably require the preemption of concurrent state regulation.

The principles for determining whether a state law is preempted are well established. If a state and federal regulation directly conflict, the Supremacy Clause, U.S. Const., art. VI, has been interpreted to mandate preemption whenever the state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52,67 (1941). Absent a direct conflict, preemption "depends on the intent of Congress." *Malone v. White Motor Corp.*, 435 U.S.

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[2]*See generally Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1978).

[3]29 U.S.C. § 1003 provides that with certain exceptions, the Act applies to "any employee benefit plan" meeting the interstate commerce prerequisites. An "employee benefit plan" is defined in § 1002:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical , or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. . . .
>
> . . . .
>
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan. . . .

497, 504 (1978). Congressional intent may be express or implied. Preemption may be implied when the "structure and purpose" of the federal act presuppose exclusive federal regulation. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). If the intention to preempt is express, the statutory need for preemption is of no consequence.

ERISA does not include any substantive provisions prohibiting an employer from maintaining discriminatory benefit plans. For this reason, we are unable to perceive any direct conflict in the application of both ERISA and the Wisconsin fair employment laws to the Bucyrus-Erie plan. Thus it would be appropriate to require preemption of the Wisconsin statute only if Congress has clearly expressed an intention to effect such preemption.

ERISA does contain express language of preemption. Section 514 of ERISA, 29 U.S.C. § 1144, provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> . . . .
>
> (b)(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

> (4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.
>
> (c) For purposes of this section:
>
> (1) The term "State law" includes all laws decisions, rules, regulations, or other State action having the effect of law, of any State . . .
>
> . . . .
>
> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

The statute appears to require preemption if the Wisconsin Employment law "relates" to an employee benefit plan, as Congress intended to use that term, unless preemption would "alter, amend, modify, invalidate, impair, or supersede" any other federal laws, rule or regulation under § 514(d). 29 U.S.C. § 1144(d).

The initial inquiry—whether the Wisconsin fair employment laws "relate" to employee benefit plans—is a difficult one. The Wisconsin Fair Employment Act is a statute of general application and not specifically designed to regulate an employer's administration of welfare benefit plans. The statute prohibits discrimination in employment on the basis of "age, race, creed, color, handicap, sex, national origin or ancestry." Wis. Stat. § 111.31(3). Prohibited acts of sex discrimination may encompass an employer's refusal to hire, termination, or the grant of promotions, and determination of compensation as well as other terms and conditions of employment. § 111.32(g)(1). It

is therefore clear that discrimination against pregnant women in the availability of disability benefits is a form of sex discrimination under the Wisconsin Act[4] and is just one of many specific actions which falls within the general reach of the statute.

In determining whether Congress intends to preempt State laws of general application, the Supreme Court recently characterized their cases in the field of labor preemption as "consistently recogniz[ing] that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to preempt laws directed specifically at concerted activity." *New York Telephone Co. v. New York State Department of Labor*, 47 USLW 4303, 4306 (March 21, 1978). The issue, however, remains one of intention, and section 514 strongly suggests that a statute of general applicability may nonetheless "relate" to a benefit plan.

This intention to include state laws of general applicability within the scope of preemption is readily inferred from the framework of the provisions of section 514.[5] Congress specifically enumerated four exceptions to the broad scope of preemption. One of those exceptions, section 514(b)(4), exempts "any *generally applicable* criminal law of a State." 29 U.S.C. § 1144(b)(4). (emphasis supplied). This provision indicates an intention that the word "relate" extend event o laws of general applicability (as well as an intention to

[4]Although the statute does not expressly prohibit dissimilar treatment on the basis of pregnancy, the Wisconsin Supreme Court found that such actions constitute sex-based discrimination prohibited under the state statute. *Ray-O-Vac v. Department of Industry, Labor & Human Relations*, 70 Wis. 2d 919, 236 N.W.2d 209 (1975).

[5]It is also apparent from the legislative history discussed *infra*.

preempt criminal statutes limited in application to welfare benefit plans). The exception would otherwise have been unnecessary. Additionally, the definition of "state" contained in the Act supports this conclusion. The definition includes any instrumentality which "purports to regulate, directly or *indirectly*, the terms and conditions of employee benefit plans. . . ." 29 U.S.C. § 1144(c)(2). (emphasis supplied).

It is also legitimate to inquire whether the term "relate" might properly be narrowed to preempt only those state laws which would operate to frustrate or interfere with the administration of ERISA. As discussed *supra*, the State Fair Employment law does not impose requirements on employee benefit plans that are in conflict with ERISA. This narrow interpretation of the term "relate" has led some courts to conclude that state fair employment statutes do not "relate" to benefit plans within ERISA's preemptive scope. *Gast v. Oregon*, 18 Fair Empl. Prac. Cas. (BNA) 210 (Oregon Ct. App. 1978); *Time Insurance Co. v. Department of Industry, Labor and Human Relations*, 16Fair Empl. Prac. Cas (BNA) 391 (Wis. Cir. Ct. 1978); *Cf. Buczynski v. General Motors Corp.*, 456 F. Supp. 867, 873 (D.N.J. 1978); *But see Goodyear Tire & Rubber Co. v. Dept. of Industry, Labor and Human Relations*, No. 77-650 (Wisc. Ct. App., Nov. 22, 1978); Hutchinson and Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 52-58 (1978). Despite the appeal of this accommodation construction, the legislative history precludes so narrow a reading of the term "relate."

The legislative history of ERISA's preemption section has been thoroughly discussed in *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir. 1978). The history reveals that as

originally passed out of the State and House, ERISA was structured to preempt only state regulation which overlapped with the requirements imposed by ERISA. The Conference Committee substituted a preemption section substantially more expansive. Senator Jacob Javits stressed the import of the conferees' change:

> Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some prticular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of pre-

> cluding essential legislation at either the State or Federal level, appropriate modifications can be made.

120 Cong. Rec. 29942 (1974).[6]

As the district court in *Hewlett* concluded:

> Overall, the legislative history reveals both that Congress carefully considered the question of preemption, including the feasibility of enacting a more limited preemption provision, and that Congress ultimately enacted Section 514(a) with the express purpose of summarily preempting state regulation of ERISA-covered employee benefit plans.

425 F. Supp. at 1300.

Therefore we do not think the section can properly be limited to preempt only those state laws which are specifically related to employee benefit plans or which only relate to these plans by imposing requirements inconsistent with ERISA. Nor can we conclude that the Wisconsin fair employment law, which would regulate certain "terms and conditions" of welfare benefit plans, relates to such plans "only in the most remote and peripheral manner." *AT&T v. Merry*, ...*F.2d* ....., ...(2d Cir. January 29, 1979); *Stone v. Stone*, 450 F. Supp. 919,.932 (N.D. Cal. 1978). A fair reading of the statute and the legislative history requires the conclusion that this Wisconsin statute "relates" to employee benefit plans unless otherwise excepted. This conclusion has been reached by several courts. *Pervel Indus-*

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[6]This quotation represents one of many references in the legislative history supportive of expansive preemption. *See* 425 F. Supp. at 1298-1300.

tries Inc. v. Connecticut Commission on Human Rights, F. Supp. .....(D. Conn. 1978), *aff'd.*, ...F.2d .....(2d Cir. April 23, 1979); *Mountain States Telephone & Telegraph Co. v. Commissioner of Labor and Industry*, Pens. Rep. (BNA), No. 210, at D-1 (D.Mont., Oct. 16, 1978); *Goodyear Tire & Rubber Co. v. DILHR*, No. 77-650 (Wisc. Ct. App., Nov. 22, 1978).

The Second Circuit, in *AT&T v. Merry*, found that in some circumstances it is appropriate to imply congressional exceptions to ERISA preemption. In *Merry*, the court found that a state court judgment ordering the ganishment of an employee's pension income to satisfy a divorce obligation was not preempted by ERISA.[7]. The court premised this exception on the tradition of federal deference to state regulation of family law, the Congressional concern manifested in ERISA to maintain the well-being of an employee's family as well as the employee, and the federal policy, manifested in other Congressional statutes, of enforcing support obligations. A similar result was reached in the lower court decisions in *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978) and *Cody v. Riecker*, 454 F. Supp. 22 (E.D.N.Y. 1978). *But see Francis v. United Technologies Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978)

As the court in *Merry*, we believe that there is evidence outside section 514 of ERISA revealing a congressional intent to preserve the application of state fair employment laws in general, and pregnancy disability laws in particular. We find, however, that this intention to except state fair

[7]The issue presented in *Merry* is particularly difficult because section 206(d)(1), 29 U.S.C. § 1056(d)(1), prohibits the involuntary assignment or alienation of pension benefits.

employment laws from preemption need not be implied.[8] Instead, we rely on this evidence of intent to conclude that the preemption of state fair employment laws would operate to "alter, amend, modify, invalidate, impair or supersede" another federal "law, rule or regulation" in contravention of an express exception in section 514 of ERISA. 29 U.S.C. § 1144(d).

Two cases addressing this issue have concluded that Title VII is not impaired in contravention of ERISA by the displacement of state fair employment laws. *Mountain State Telephone & Telegraph Co. v. Commissioner of Labor and Industry*, Pens. Rep. (BNA), No. 210, at D-1 (D. Mont. Oct. 16, 1978); *Pervel Industries Inc. v. Connecticut Commission on Human Rights*, ...F.Supp. .....(D. Conn. 1978), aff'd .....F.2d .....(2d Cir. 1979). While it is true that the Equal Economic Opportunities Commission will still be able to enforce the federal prohibitions against employment discrimination contained in Title VII, these decisions construe too narrowly the nature of the *federal* scheme embodied in Title VII.

Preemption of state fair employment laws would at a minimum "alter," and probably "impair," the Congressional scheme for preventing and penalizing employment discrimination in the administration of welfare benefit plans in contravention of section 514(d). This conclusion derives support from a variety of sources: the provisions and legislative history of Title VII, the legislative history of ERISA, and the legislative history of the recently enacted federal

[8]We express no opinion on when it might be appropriate to imply exceptions beyond those specifically enumerated in section 514.

pregnancy disability amendments to Title VII.[9] Turning first to Title VII itself, it is clear that the federal scheme embodied in its laws, rules and regulations contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework. State laws are specifically preserved in two sections of Title VII and Title XI, section 708, 42 U.S.C. § 2000e-7, and section 1004, 42 U.S.C. § 2000h-4.[10]

Congress also designed an enforcement system premised on the enforcement and preservation of state fair employment laws. Federal agency action is deferred until a state has had an initial opportunity to remedy the employment discrimination charged. *See* 42 U.S.C. §§ 2000e-5(c), (d), (e). Further, under § 2000e-5(b) the EEOC must "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State

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[9]In determining whether a particular statute contemplates preemption, the Supreme Court has frequently relied on Congressional intent expressed in other statutes to aid in that determination. *See New York Telephone Co. v. New York State Department of Labor*, 47 U.S.L.W. 4303, 4307-8 (March 21, 1979); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

[10]Section 708 provides:

> Nothing in this title [VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Section 1104 provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

or local law" in determining whether there is reasonable cause to believe a discrimination charge. To preempt the application of state fair employment laws to employee benefit plans would also cause a regulatory void as to employers not subject to Title VII but operating plans covered by ERISA.

These provisions illustrate that Title VII was "designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). The Supreme Court in *Gardner-Denver* emphasized the role of state laws in the federal scheme. "[L]egislative enactments, in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, . . . Congress indicated that it considered the policy against discrimination to be of the 'highest priority.' . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. . . ." *Id.* at 47.

The legislative history of Title VII also emphasizes the coordination with and utilization of state fair employment laws. Senator Humphrey explained that the Act "afforded every opportunity" to states to remedy discrimination and that Title VII could properly be characterized as a "State responsibility bill." 110 Cong. Rec. 122724-25 (1964). The intention to preserve and utilize state fair employment laws manifested in Title VII is persuasive evidence that Congress did not intend to disrupt this scheme in the context of employee benefit plans.

The legislative history of ERISA also provides support for the conclusion that section 514(d), preserving federal law, should be construed to preclude preemption of state fair

employment laws.[11] Senator Mondale and Representative Abzug sought to include in ERISA provisions prohibiting discrimination in the administration of welfare benefit plans. Senator Williams assured Senator Mondale that such an amendment would be unnecessary and might undermine federal anti-discrimination efforts, stating: "I believe that . . . centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunities Commission under terms of existing law.' 119 Cong. Rec. 30409 (1973). Representative Dent reiterated in the House that discrimination could best be prohibited "under terms of existing law." 120 Cong. Rec. 4726 (1974). On this basis, ERISA was not amended to prohibit discrimination.

Thus Congress expressed an intention to preserve the "terms of existing law" in the field of employment discrimination. In view of the pervasive role of the states under Title VII, we conclude that "existing law" included state fair employment laws. Senator Williams's emphasis on centralizing enforcement in the EEOC should properly be interpreted as an attempt to prevent competing authority in other federal agencies and not as an intent to limit the role of the states since the EEOC itself purposefully utilizes the states.[12] In fact, the EEOC has appeared in this case as an

[11]This preemption analysis might well be altered if the particular state employment law presumably preserved by 514(d) actually conflicted with the terms of ERISA. It would of course be a question of intent.

[12]The EEOC's guidelines illustrate the degree of state and federal coordination in the prevention of employment discrimination. Section 5.2 of the EEOC Compliance Manual describes discrimination charges received by the state and federal agencies as a "common workload." The section states it is the policy of the EEOC to "striv[e] for an integrated charge processing system" with the states and allows for funding to the states to further shared administration.

Despite the EEOC's own use of state agencies, the district court in *Pervel*, *supra*, found that an intent to centralize federal antidiscrimination efforts in the EEOC was inconsistent with inferring an intent to preserve state

amicus curiae to urge the preservation of state fair employment laws. As the Supreme Court has recently noted, the amicus position of an agency charged with the principal enforcement of an Act should be carefully considered. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 47 USLW 4359 (1979).

The history of the recently enacted Pregnancy Disability Act, 92 Stat. 2076, P.L. 95-555, also suggests the propriety of this conclusion. The statute amends Title VII to prevent discrimination in granting disability benefits to pregnant women. The Senate Report states that the existing provisions of Title VII preserving state law would permit the states with laws prohibiting pregnancy-based discrimination to "continue . . . to enforce their state laws if this bill were enacted." S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 n.1 (1977). This statement is particularly significant since the major application of laws prohibiting pregnancy discrimination is in the context of employee benefit plans. To preempt such laws under ERISA as they "relate" to employee benefit plans would certainly vitiate this Congressional statement that the states may continue to enforce such laws.

Similar authority appears in the House Report to the bill. The extent to which the act would impose a new financial burden on employers was a central issue surrounding passage of the bill. The report concludes that the financial impact would be minimal since many employers were already required by state law to treat pregnancy similar to other disabilities. The report concludes:

> At least 22 States, including the most populous States, now mandate some form of pregnancy disability coverage. . . . The significance of this State coverage for HR 6075 (PL 95-555) is manifold:

> First, many employers are *already* under a State law obligation to provide benefits to pregnancy disabled workers. Passage of the bill thus has little or no economic impact on such employers. Second, employers who operate in several states face different requirements depending on the State; likewise, the rights of pregnant employees depend on the laws of the State in which they are employed.

H. Rep. No. 85-948, 95th Cong., 2d Sess. at 11 (1978) (emphasis added.) For what it is worth, it is clear that Congress passed pregnancy disability legislation with the assumption that state pregnancy disability laws were in full effect. We construe this as further evidence that state fair employment laws were considered to be fully embedded in the Title VII scheme for eradicating employment discrimination.[13]

[13]The second circuit's brief affirmance of *Pervel Industries, supra*, infers that state fair employment laws were preempted by ERISA but were somehow reinstated by the passage of the federal pregnancy disability act. The court states:

> This case arose before the amendment of Title VII in October 1978 by the Pregnancy Disability Act. . . . At that time state statutes, except those specifically excluded, were preempted by ERISA "insofar as they may . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a).

..... F.2d ....., ...

Similarly confusing is Senator Javits's explanation of a new bill proposing amendments of the ERISA preemption provisions. The bill, S. 209, reprinted in 125 Cong. Rec. 560 (daily ed. Jan. 24, 1979), broadens the preemption exceptions. Senator Javits stated in the Senate, "Our bill does not address State sex discrimination laws . . . because passage of the pregnancy sex discrimination amendments, . . . appears to have mooted the issue of preemption of State laws requiring disability plans to cover pregnancy-related leave." *Id.* at 575.

We are unaware of any provision of the Pregnancy Disability Act designed to amend ERISA. We rely on the Act and its history only to demonstrate the Congressional view of the States' role in the Title VII scheme. We do not think the Pregnancy Disability Act in any way modifies the preemption provisions of ERISA—it only serves to clarify the application of the 514(d) exception.

Although some authorities have suggested that state fair employment laws are preempted,[14] we join the authorities concluding that the balance of the evidence suggests that Congress did not intend to preempt state fair employment laws since such preemption would "alter, amend, modify . . . [or] impair" the federal framework for prohibiting employment discrimination. *See, Goodyear Tire & Rubber Company v. Department of Industry, Labor and Human Rela-*

[14]*See* cases cited supra at 10. Statements of Senators Williams and Javits examining the effect of ERISA preemption on stage age discrimination statutes also support the view that state fair employment laws are preempted:

> Mr. JAVITS. Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws also are not to interfere with ERISA. The ADEA itself, as pointed out in the Senate report, does not preempt such State age discriminations laws. However, there should be no question that the preemption rules of section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which directly or indirectly establish requirements relating to employee benefit plans. ERISA's preemption of State age discrimination laws shall be determined without regard to section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law.
>
> Mr. WILLIAMS. I concur in my friend's observations as they accurately state the controlling principles of law in this regard. *Federal law will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in section 4(a) of ERISA and are not exempt under section 4(b) of ERISA.*

124 Cong. Rec. S4451 (daily ed. March 23, 1978), as corrected, 124 Cong. Rec. S4767 (daily ed. April 4, 1978) (emphasis added).

However Senator Javits, reporting to the Senate committee overseeing ERISA, stated that ERISA preemption "may have gone further than desirable" since state statutes regulating health care service plans were found preempted in judicial decisions. Senator Javits expressed concern that "other areas of potential conflict" might include the preemption of state fair employment laws. Senate Committee on Human Resources, 95th Cong., 1st Sess., Oversight of ERISA at 61 (1977). *See also* Senator Javits's most recent preemption observations in note 13 *supra*.

tions, No. 77-650 (Wis. Ct. App., Nov. 22, 1978); *Liberty Mutual Insurance Co. v. State Division of Human Rights*, 61 A.D.2d 822, 402 N.Y.S.2d 218 (App. Div. 1978).*Cf. Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).[15]

The judgment is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[15] In *Wadsworth*, the First Circuit found that the McCarren-Ferguson Act policy of preserving state regulation of insurance is impliedly "reaffirmed" by section 514(d) of ERISA. 562 F.2d at 78. We note however that the preservation language in the McCarren Act is broader than the preservation language incorporated in Title VII. *Compare* 15 U.S.C. § 1012 *with* 42 U.S.C. § 2000h-4

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-107

STATE OF CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL.,
Petitioners,

v.

PERVEL INDUSTRIES, INC.,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Dated: September 11, 1979

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v.

PERVEL INDUSTRIES, INC.,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Did the Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq., (ERISA) preempt Connecticut General Statutes § 31-126 insofar as the state statute imposed requirements for pregnancy disability benefits upon an employee benefit plan regulated by ERISA?

STATEMENT OF THE CASE

Pervel Industries, Inc. and Teamsters Local 798, which represents its production employees, had collectively bargained for an employee welfare benefit plan which was regulated by ERISA. The plan was affiliated with other Tri-State Teamster Plans and also provided for reciprocal coverage and contribution credit with certain "out of town welfare funds."

Two employees applied for benefits during leaves of absences granted because of pregnancy. Medical benefits were granted but certain weekly disability payments were refused. Although, at the time, the Court in *Gedulig v. Aiello*, 417 U.S. 484 (1974), *General Electric Corp. v. Gilbert*, 429 U.S. 125 (1976) and *Nashville Gas Company v. Satty*, 434 U.S. 136 (1977) had concluded that denial of such benefits did not constitute discrimination on account of sex, a Connecticut Commission on Human Rights and Opportunities (CCHRO) representative notified Pervel that the plan's failure to treat pregnancy as a nonoccupational disability constituted sex discrimination which could only be remedied by modification of the plan or the benefits available to employees. Connecticut General Statutes § 31-126(g) prohibits an employer from denying employees "disabled as a result of pregnancy, any compensation to which she is entitled as the result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by said employer."

Pervel then sought declaratory and injunctive relief to halt the state's administrative proceedings. On October 16, 1978, United States District Judge Jon O. Newman entered summary judgment declaring that ERISA preempts Connecticut General Statute § 31-126 insofar as its provisions apply to employee benefit plans subject to ERISA.

The District Court examined the broad sweep of Section 514 of ERISA, 29 U.S.C. § 1144, which provides that, with

the exception of certain specified categories, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any [covered] employee benefit plan." Since Connecticut's anti-discrimination law legislates specifically on the subject of disability benefits, the Court found it related to an employee benefit plan and was preempted.

The Court specifically rejected CCHRO's contention that Section 514(d) of ERISA, 29 U.S.C. § 1144(d), which preserves *federal* law, saved the application of the Connecticut statute. The Court noted that Connecticut's anti-discrimination law does not become a federal law simply because it it not preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The Court stated: "Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII. Whatever is prohibited by Title VII remains prohibited under ERISA, but exclusion of disability benefits for pregnancy does not violate Title VII. *Gilbert*, [supra.]" Thus the District Court found that preemption of Connecticut General Statutes § 31-126(g) by ERISA did not impair any federal law.

On October 28, 1978 the District Court denied CCHRO's Motion for Rehearing to Open and Amend Judgment in view of the subsequent Congressional amendment to Title VII by passage of the Pregnancy Disability Act, 42 U.S.C. § 2000e(k), which, effective April 30, 1979, requires employee benefit plans to treat disability because of pregnancy in the same manner as other disabilities. The District Court noted that its decision did not preclude CCHRO from any benefits it might be entitled to under any new Congressional legislation.

The District Court opinion was affirmed by the United States Court of Appeals for the Second Circuit on April 23, 1979.

THE PASSAGE OF THE PREGNANCY DISABILITY ACT HAS ELIMINATED ANY SIGNIFICANCE TO THE QUESTION PRESENTED

Petitioner's application for a writ of certiorari is based upon a conflict between the decision below and *Bucyrus Erie Company v. The Department of Industry, Labor and Human Relations of the State of Wisconsin et al*, 599 F.2d 205 (7th Cir. 1979) (See Petitioner's Appendix E). However, any conflict which exists has been rendered moot by the passage of the Pregnancy Disability Act.

Both the decision below and *Bucyrus Erie* agree that state anti-discrimination laws "relate" to employee benefit plans within the meaning of ERISA. The only conflict exists on the issue of whether a state law which requires that disability for pregnancy be treated the same as other disabilities is saved from preemption as a "federal law" within the meaning of Section 514(d) of ERISA. 29 U.S.C. 1144(d). However, this conflict has been resolved by the Pregnancy Disability Act's amendment of Title VII which imposes the same requirements with respect to disability as the state statutes involved. Thus the requirements of Title VII no longer differ from the requirements of Connecticut General Statutes § 31-126(g). Therefore, the question presented to the Court has no further public importance and will not recur.

THE ERISA IMPROVEMENTS ACT, NOW PENDING BEFORE CONGRESS, DEALS SPECIFICALLY WITH THE PREEMPTION QUESTION

In enacting ERISA, Congress created a Joint Pension Task Force to study and report the effects and desirability of broad federal preemption. 29 U.S.C. § 1221-1222(a)(4). Thus Congress has created a vehicle to refine the scope of preemption if necessary.

On January 24, 1979, Senator Jacob Javits, a principal architect of ERISA, introduced the ERISA Improvements Act (S.209 reprinted in 125 Cong. Rec. 560, daily ed. January 24, 1979), which deals specifically with ERISA's preemption sections. Thus it would appear that there is no question concerning preemption which needs to be resolved by the Court at this time.

CONCLUSION

Respondent respectfully submits that the question presented has been made moot by the Pregnancy Disability Act. Petitioner has failed to show that any important federal question exists and has not shown any special circumstances to warrant the granting of a writ of certiorari. Thus the petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas M. Cloherty, attorney for the Respondent, hereby certify that, on the 12th day of September 1979, I served three copies of the foregoing Response to Petition for a Writ of Certiorari by mailing the same with first class postage prepaid, to counsel of record at their post office address.

Thomas M. Cloherty

APPENDIX

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APPENDIX

Statutes

CONNECTICUT GENERAL STATUTES

Connecticut General Statute, § 31-126(a)

It shall be an unfair employment practice for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, age, sex, marital status, national origin, ancestry or physical disability, including, but not limited to, blindness of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment;

Connecticut General Statute, § 31-126(g)

It shall be an unfair employment practice for an employer, by himself or his agent, (i) to terminate a woman's employment because of her pregnancy or (ii) to refuse to grant to said employee a reasonable leave of absence for disability resulting from such pregnancy or (iii) to deny to said employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by said employer. Upon signifying her intent to return, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

UNITED STATES CODE

29 U.S.C. § 1221-1222

SUBTITLE B — JOINT PENSION TASK FORCE: STUDIES

PART 1 — JOINT PENSION TASK FORCE

§ 1221. ESTABLISHMENT

The staffs of the Committee on Ways and Means and the Committee on Education and Labor of the House of Representatives, the Joint Committee on Internal Revenue Taxation, and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate shall carry out the duties assigned under this subchapter to the Joint Pension Task Force. By agreement among the chairmen of such Committees, the Joint Pension Task Force shall be furnished with office space, clerical personnel, and such supplies and equipment as may be necessary for the Joint Pension Task Force to carry out its duties under this subchapter.

§ 1222. DUTIES

(a) The Joint Pension Task Force shall, within 24 months after September 2, 1974, make a full study and review of —

(1) the effect of the requirements of section 411 of Title 26 and of section 1053 of this title to determine the extent of discrimination, if any, among employees in various age groups resulting from the application of such requirements;

(2) means of providing for the portability of pension rights among different pension plans;

(3) the appropriate treatment under subchapter III of this chapter (relating to termination insurance) of plans established and maintained by small employers;

(4) the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans; and

(5) such other matter as any of the committees referred to in section 1221 of this title may refer to it.

(b) The Joint Pension Task Force shall report the results of its study and review to each of the committees referred to in section 1221 of this title.

29 U.S.C. § 1144

OTHER LAWS

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and Application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

42 U.S.C. § 2000e-2(a)

Unlawful employment practices — Employer practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e(k)

(k) The terms "because of sex" or "on the basis of sex" include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.